IN THE SUPREME COURT OF FLORIDA

US SPRINT COMMUNICATIONS COMPANY, Appellant, -v.- JOHN R. MARKS, et al., Appellee.	Consolidated Cases Case No. 69,169
MICROTEL, INC., Appellant, -v.- JOHN R. MARKS, et al., Appellee.	Case No. 69,159

INITIAL BRIEF OF US SPRINT COMMUNICATIONS COMPANY

ON APPEAL FROM THE PUBLIC SERVICE COMMISSION

Stephen P. Bowen
US SPRINT COMMUNICATIONS COMPANY
1850 M Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 857-1030

Deborah A. Dupont
REBOUL, MacMURRAY, HEWITT, MAYNARD & KRISTOL
1111 19th Street, N.W.
Suite 406
Washington, D.C. 20036
(202) 429-0004

Bruce W. Renard
MESSER, VICKERS, CAPARELLO, FRENCH & MADSEN
P.O. Box 1876
Tallahassee, FL 32302
(904) 222-0720

October 22, 1986

TABLE OF CONTENTS

Table of Citations

Page

MISCELLANEOUS

Introduction

US Sprint Communications Company ("US Sprint") filed this appeal on August 13, 1986, pursuant to Article V, section 3(b)(2) of the Florida Constitution, section 364.381 of the Florida Statutes, and Florida Rule of Appellate Procedure 9.030(a)(1)(B)(ii). US Sprint seeks judicial review of Order No. 16343, issued by the Florida Public Service Commission (the "Commission" or "PSC") on July 14, 1986, establishing a permanent prohibition upon facilities-based toll telephone competition within geographic areas designated by the Commission as Equal Access Exchange Areas ("EAEAs"). By order of August 20, 1986, the Court consolidated the present appeal with an appeal, filed by Microtel, Inc. ("Microtel") that challenged the same Commission Order. AT&T Communications of the Southern States, Inc. and MCI Telecommunications Corporation subsequently joined these proceedings in support of the appellants. General Telephone of Florida and United Telephone Company of Florida have intervened as party appellees.[1/]

1/ Citations to the appendix annexed to US Sprint's initial brief will be in the form of "A.___." Citations to the transcript of the hearings below will be in the form of "Tr.___." The identity of the witnesses will be indicated by their surnames.

Statement Of The Case And Facts

By Order No. 11551, issued January 26, 1983, the Commission, on its own motion, initiated this docket to establish a structure for intrastate access charges to be paid by long distance telephone companies, also known as interexchange or toll carriers, to the local exchange companies (or "LECs") for use of LEC local networks to originate and terminate long distance traffic within the state of Florida. On December 9, 1983, in Order No. 12765, the Commission issued its initial decision regarding the structure of intrastate access charges and introduced the concept of equal access exchange areas and toll monopoly areas ("TMAs").[2/] Equal access exchange areas were originally configured consistently with planned 1987 toll centers in order to provide efficient local access for long distance carriers to reach all LEC customers within an EAEA through a single point of interconnection with LEC facilities. As the concept of EAEAs evolved during the proceeding, the Commission determined to establish each EAEA as a toll monopoly area within which only local

---

2/ A.2. An EAEA is a geographical area including both exchange and interexchange telephone traffic routes. The EAEA structure was designed by the Commission as the technical network configuration for providing equal access to local exchange networks.

A TMA encompasses the same geographical area as an EAEA. The use of the term "toll monopoly area" signifies a prohibition upon local exchange and interexchange facilities-based competition within the EAEA.

exchange carriers could provide facilities-based long distance service. All other telephone companies were only allowed to provide toll service within EAEAs through resale of LEC facilities and services.

The Commission determined to implement EAEAs "by July 1, 1984 unless evidence was received by the Commission demonstrating that it would not be economically beneficial to the ratepayers."[3/] On October 5, 1984 and December 11, 1984, the Commission issued Order Nos. 13750 and 13912, respectively, establishing and implementing both the EAEAs and the toll monopoly restriction. The toll transmission monopoly areas were established only on a transitional basis, however, until September 1, 1986, and the Commission stated that it would revisit the issue of toll transmission monopoly areas prior to that date, whereupon the parties advocating retention of the toll monopoly restriction would have the burden of demonstrating that toll monopoly areas should continue in the public interest.[4/]

The Commission's orders were appealed to this Court as a violation of the Florida Legislature's 1982 amendments to

---

3/ A.3.

4/ A.16 and 20. The terms "toll monopoly area" and "toll transmission monopoly area" generally have been used interchangeably throughout these proceedings. The Commission thus referred to "toll monopoly areas" in its discussion (A.16) and to "toll transmission monopoly areas" in its ordering paragraph (A.20).

Chapter 364 authorizing toll competition and this Court's decision in Microtel, Inc. v. Florida Public Service Commission, 464 So. 2d 1189 (Fla. 1985) ["Microtel I"]. Upholding the legislative policy, the Court in Microtel, Inc. v. Florida Public Service Commission, 483 So. 2d 415 (Fla. 1986) ["Microtel II"] reiterated its finding in the Microtel I decision that the legislature had made the "fundamental primary decision that there will be competition in intrastate long distance telephone service." While recognizing that the Commission's decision in Order No. 13750 was contrary to the legislative mandate for toll competition, the Court nonetheless upheld the decision as a reasonable "interim plan," emphasizing that "we do not believe that it is the PSC's position that it has authority to maintain permanent toll monopolies."[5/]

Pursuant to Order No. 13750 and the reliance placed upon it by this Court in Microtel II, the Commission conducted two days of evidentiary hearings on May 1 and 2, 1986 at which both the local exchange companies and the interexchange companies offered company and expert witnesses. The Commission formally reviewed the testimony, the post-hearing briefs of the parties, and the Staff Recommendation at a Special Agenda Conference on June 24, 1986, at which time it found that toll transmission monopolies are in the public interest and should be retained on a

---

5/ Microtel II at 418-19.

permanent basis. The Commission's decision at the Special Agenda Conference subsequently was embodied in Order No. 16343, issued July 14, 1986. US Sprint and Microtel, Inc. timely filed appeals with this Court on August 13, 1986, and August 12, 1986, respectively, challenging Order No. 16343.

A. The Business of US Sprint

US Sprint is a telecommunications common carrier that operates a nationwide telecommunications system providing voice, data and facsimile transmission services to customers throughout the United States. US Sprint competes with other interexchange carriers in the toll or long distance telephone market, on an interstate and intrastate basis, in Florida and in other states. US Sprint's long distance telecommunications network consists of fiber optic, microwave, satellite, and similar toll transmission facilities that transmit telephone calls. The origination and completion of toll telephone calls placed over US Sprint's facilities are accomplished through the interconnection of US Sprint's network with local exchange telephone facilities. US Sprint pays exchange access charges to the local companies for such interconnection.

US Sprint is a joint venture of GTE Corporation and United Telecommunications, Inc. US Sprint came into existence on July 1, 1986, through the merger of the assets and operations of GTE Sprint Communications Corporation ("GTE Sprint") and US

Telecom, Inc. ("US Telecom"). The merger of GTE Sprint and US Telecom was approved by the Florida Public Service Commission as well as by the Federal Communications Commission and by the United States Department of Justice.[6/]

GTE Sprint's predecessor, Southern Pacific Communications Company, began offering interstate toll service in 1978 and in 1982 added the first Florida city, Miami, to its interstate network. GTE Sprint was certificated by the Commission in 1983 to offer intrastate toll service via resale of Wide Area Telephone Service ("WATS") and Message Toll Service ("MTS") and the company filed its first Florida intrastate tariff in that year.[7/] GTE Sprint's authority was expanded on

---

6/ See In re Petition for Transfer of Certificates to Provide Intrastate Communications Service from GTE Sprint Communications Corporation and U.S. Telephone, Inc., d/b/a U.S. Telecommunications Services Company to US Sprint Communications Company, Docket No. 860240-TP, Order Nos. 16185 (June 5, 1986) and 16298 (July 1, 1986); "Memorandum Opinion and Order," In re Application for Consent to Assignment of Licenses and Transfer of Control of Certain Subsidiaries of GTE Corporation and United Telecommunications, Inc. to US Sprint Communications Company, FCC File No. ENF-86-4 (June 18, 1986); "Report to the Court of the Approval by the U.S. Department of Justice, Pursuant to Paragraph VI(A) of the Final Judgment in United States v. GTE Corporation, of the Proposed Joint Venture Between GTE Corporation and United Telecommunications, Inc.," dated June 30, 1986, in U.S. v. GTE Corp., Civil Action No. 83-1298 (D.D.C.).

7/ In re Application of GTE Sprint Communications Corporation for a Certificate of Public Convenience and Necessity to Provide Intrastate Long Distance Telephone Service Within the State of Florida, Docket No. 830118-TP, Order No. 12391 (August 19, 1983).

January 20, 1984, when the company was authorized to provide intrastate long distance telecommunications services in Florida through the use of its own facilities.[8/]

US Telecom has provided interstate toll service since 1980 and expanded its interstate switched toll network to Orlando in 1984. The Commission issued US Telecom a resale certificate, effective March 6, 1985, to offer intrastate service. That authorization was extended subsequently to allow US Telecom to provide intrastate long distance service over its own facilities beginning on January 1, 1986.[9/]

B. The Entry Of Toll Competitors Into The Telephone Industry Began With The Construction of Nationwide Networks Pursuant To Federal Authority

The entrance of competitors into the toll telephone market developed from a series of Federal Communications Commission ("FCC") rulings in combination with several landmark federal appellate decisions. Starting in 1959, the FCC began to open the interstate private line market to competition.[10/]

8/ In re Application of GTE Sprint Communications Corporation for a Certificate of Public Convenience and Necessity to Provide Intrastate Long Distance Telephone Service Within the State of Florida, Docket No. 830118-TP, Order No. 12913 (January 20, 1984).

9/ In re Application for U.S. Telephone, Inc. d/b/a US Telecom, Inc. for an Extension of Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications, Docket No. 850461-TP, Order No. 15474 (December 20, 1985).

10/ Above 890 MHz, 27 F.C.C. 357 (1959), reconsidered, 29 F.C.C. 825 (1960).

Subsequently, in 1969, the FCC issued its first authorization to a specialized common carrier to provide private line services to subscribers between Chicago and St. Louis.[11/] Not long thereafter, in a proceeding known as the Specialized Common Carrier Services inquiry, the FCC determined that, as a matter of federal policy, the public interest would be served by competition in the provision of specialized common carrier telecommunication services.[12/]

Over time, the private line services offered by specialized carriers took on some of the characteristics of switched services. In 1974, MCI filed a tariff for its Execunet service, an interstate switched voice message toll offering. After proceedings before the FCC, the District of Columbia Circuit confirmed the right of MCI to use its authorized facilities for the provision of such services. This decision, known as Execunet I, established the right of Other Common Carriers ("OCCs"), such as US Sprint, to provide switched message toll services in

---

11/ Microwave Communications, Inc., 18 F.C.C.2d 953 (1969), reconsideration denied, 21 F.C.C.2d 190 (1970).

12/ In re Establishment of Policies and Procedures for Consideration of Application To Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, 29 F.C.C.2d 870 (1971), aff'd sub nom. Washington Utilities & Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied sub nom. National Association of Regulatory Commissioners v. FCC, 423 U.S. 836 (1975).

competition with the message toll service offerings of the Bell System.[13/] Subsequently, in Execunet II, the right of OCCs to obtain interconnection for such offerings was also judicially affirmed.[14/]

In 1974, the federal government brought an antitrust action against AT&T in the United States District Court for the District of Columbia. A key allegation of that action was the government's claim that the Bell System had used its power over the "bottleneck" of access to local exchanges to harm competing long distance companies and to preserve the Bell System monopoly over toll service.

In January 1982, AT&T and the Department of Justice announced a settlement of that action. The terms of the settlement, cast as a modification[15/] of the consent decree in an earlier antitrust action, divested AT&T of its ownership of the Bell Operating Companies ("BOCs") and imposed various conditions and requirements upon both AT&T and the divested BOCs.

Under the terms of the MFJ, the divested BOCs were required to provide exchange access on an equal and non-discriminatory basis to all long distance carriers. The decree

---

13/ MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1975).

14/ MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir. 1978), cert. denied, 439 U.S. 980 (1978).

15/ Modified Final Judgment ("MFJ").

also specified a geographical basis for separating the toll business of the Bell System, assigning one portion of the business to AT&T and dividing the other portion between the respective BOCs. Implementation of the decree involved the division of the nation into approximately one hundred and sixty-one geographic areas denominated as Local Access Transport Areas ("LATAs"). Moreover, the MFJ restricted the extent of the toll business in which the BOCs were permitted to engage. They were allowed to provide toll service within but not between LATAs. The Court regarded the limitation upon the areas within which a BOC may provide service as a pro-competitive action that removed the BOCs' incentive to discriminate against AT&T's competitors in providing access to the local exchange network.[16/]

In Florida, the MFJ established seven LATAs.[17/] As this Court explained in Microtel II, the large size of two of the Florida LATAs created controversy during the MFJ proceedings, but the federal court ultimately approved those two LATAs because,

---

16/ United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 165 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001, 75 L.Ed.2d 472, 103 S.Ct. 1240 (1983).

17/ The Southern Bell Telephone and Telegraph Company territory in the seven Florida LATAs established pursuant to the federal court's opinion was divided into nine EAEAs by the Commission in implementing toll monopoly areas. The Commission also divided the territory of the other local exchange companies into EAEAs, for a total of 22 EAEAs in Florida.

inter alia, "the state regulatory body, PSC, was a strong body committed to promoting intra-LATA competition."[18/]

C. Authorization of Competitive Carriers to Offer Toll Service in Florida

Like a number of other states, Florida's telephone statutes historically had followed the "first-in-the-field" doctrine, protecting existing telephone companies from duplication of their services and facilities. In concert with the federal government's efforts to promote competition at the national level, the Florida legislature, at the behest of the Commission as well as would-be competitors, removed the statutory restrictions on interexchange competition in the Florida law.

1. Conflict With the "First-in-the-Field" Statutory Standard: The Commission-Sponsored Drive to Amend the Statutes

In 1980 Microtel requested that it be granted a certificate to establish its own facilities in Florida for the transmission of interexchange telephone traffic.[19/] During the Commission's proceedings, local telephone companies argued that certification of Microtel would conflict with the then-existing

---

18/ Microtel II, 483 So. 2d at 417.

19/ In re Application of Microtel, Inc. for a Certificate to Construct and Operate a Microwave Communications System; and for a Certificate to Engage in Purchase Resale of Communications Services between points in Florida, Docket No. 800333-TP, Order No. 11095, (August 23, 1982).

statutory scheme, which protected established telephone companies from competition absent a showing of inadequate service. Partially in response to these proceedings, the Commission, with the support of the local exchange companies, proposed a bill to the legislature to permit such competition. Additionally, the Commission proposed as a part of the bill a section setting forth standards to govern the Commission's determination of the appropriate level of regulation for competitive carriers.[20/]

On February 2, 1982, Senate Bill 868 was introduced by Senator Stuart. Among other proposed changes, section 4 of the bill was designed to permit the Public Service Commission to grant certificates of operating authority to competing telephone companies except for local exchange services. The "Senate Staff Analysis and Economic Impact Statement" indicated that enactment of the bill should have a positive economic impact on the public. That report stated that "with normal market forces at work, increased competition fosters better service at a lower cost to consumers. It is assumed that this will occur in the telecommunications field."[21/] House Bill 1076, containing similar provisions, was introduced on February 16, 1982.

20/ See "Answer Brief of Appellee Florida Public Service Commission," submitted to this Court in Microtel v. Florida Public Service Comm'n, Consolidated Case Nos. 64,801, 65,307, 65,351, and 65,449 (August 31, 1984).

21/ Staff of Fla. S. Comm. on Econ., Comm'y & Cons. Affairs, CS for SB 868 (1982) Staff Analysis 2 (February 23, 1982).

At the time of the legislative proceedings, the existing statute prohibited grant of "a certificate for a proposed telephone company, or for the extension of an existing telephone company, which will be in competition with, or which will duplicate the services provided by, any other telephone company," unless the Commission determined that the existing facilities were inadequate to meet the reasonable needs of the public.[22/] The new legislation limited these restrictions solely to local exchange service, thus eliminating such statutorially defined monopolies with respect to toll services and facilities.

The bill containing the language proposed by the Commission passed both houses of the legislature without amendment and was signed into law by the Governor on March 13, 1982.[23/] Subsequently, this Court was called upon to confirm that the legislature intended by its 1982 amendments to establish a policy of competition in toll telephone service.[24/]

2. Microtel I: The Commission's Certification of Competing Long Distance Companies Was Upheld Upon Appeal

Following the 1982 amendments to Chapter 364, Microtel was issued a certificate of public convenience and necessity to

---

22/ Fla. Stat. § 364.335(4) (1981).

23/ Ch. 82-51, 1982 Fla. Laws 122, 125, codified at Fla. Stat. § 364.335(4) (1982).

24/ Microtel I and Microtel II.

provide competitive intrastate long distance service.[25/] Subsequently, several other carriers were granted similar authority.[26/] Microtel appealed the certification of the other long distance companies to this Court.

Microtel pressed two primary arguments on appeal. First, Microtel argued that the Commission is required to consider the criteria enumerated in § 364.337(2) of the Florida Statutes in determining whether to issue a certificate for additional toll service.[27/] In rejecting Microtel's argument, the

---

25/ In re Application of Microtel, Inc. for a Certificate to Construct and Operate a Microwave Communications System; and for a Certificate to Engage in Purchase Resale of Communication Services between points in Florida, Docket No. 800333-TP, Order No. 11095 (August 23, 1982).

26/ On April 5, 1983 MCI was granted the first resale certificate after Microtel (Order No. 11800) with the Commission later expanding MCI's certificate to include facilities-based service on July 23, 1983 (Order No. 12292). GTE Sprint, United States Transmission Systems, and Satellite Business Systems closely followed with their requests for certificates, which the Commission ultimately granted.

27/ The considerations listed in § 364.337(2) are as follows:

(a) The number of firms providing the services;

(b) The geographic availability of the service from other firms;

(c) The quality of service available from alternative suppliers;

(d) The effect on telephone service rates charged to customers of other companies; and

(e) Any other factors that the Commission considers relevant to the public interest.

Court adopted the statutory interpretation proffered by the Commission.[28] The Court explained that:

> . . . Sections 364.335 and 364.337, taken together, provide for a two-step certification process. The first step, governed by § 364.335, requires the Commission to make an initial decision whether to issue a certificate, guided by the discretionary proviso that certification be in the public interest. Only after the Commission has decided to certify do the provisions of § 364.337 come into play. The enumerated criteria of § 364.337(2) are to be considered in determining what special requirements and exemptions from regulations should govern the certified company. They are not relevant to the initial determination of whether to issue the certificate.[29]

The Court further rejected Microtel's argument that such an interpretation would violate the non-delegation doctrine, holding that the necessary standards and guidelines are set forth in § 364.335(1). The Court stated:

> It is fairly obvious from the language of this Section that the legislature wanted the Commission to make certain that competition in long distance telephone service would be conducted by one who has the technical and financial ability to provide such services, and to know what territory the applicant proposed to operate in and the facilities that would be provided, and to ascertain what service, if any, was currently being provided by others in geographical proximity to the territory applied for. The clear legislative intent to foster competition also illuminates the public interest standard of § 364.335(4). We are of the opinion that adequate standards and guidelines are provided in this statute in light of the legislative objective to bring competition into this business area which had not heretofore existed.[30]

28/ Microtel I, 464 So. 2d at 1190-91.

29/ Id. at 1191.

30/ Id. (emphasis added).

Finally, the Court rejected Microtel's claim of entitlement "to be protected from competition until it has had a reasonable time to establish itself in the marketplace."[31/] The Court described Microtel's argument as a "wishful reading" of § 364.345(1), which requires a telephone company to provide adequate and efficient service within its territory. Explaining that the statute "is intended to protect consumers, not the telephone companies," the court stated that "[i]t is arguable whether the legislative mandate would even permit the Commission to limit competition" by restricting entry during a protective period.

D. Prior Commission and Court Proceedings Concerning Toll Monopoly Areas in Florida

1. The Commission Established EAEAs in Docket No. 820537-TP

With the statutory policy confirmed, the Commission turned its attention to the granting of certificates and the implementation of policies to assure the nascent interexchange carriers a fair opportunity to compete. Accordingly, by Order No. 11551, issued January 26, 1983, the Commission initiated a docket to establish a structure for intrastate access charges to be paid by long distance telephone companies to the local exchange companies for use of their local networks to originate and terminate toll telephone traffic within the State of Florida.[32/]

31/ Id. at 1192.

32/ A.2.

On December 9, 1983, in Order No. 12765, the Commission issued its initial decision regarding the structure of intrastate access charges and introduced the concepts of equal access exchange areas and toll monopoly areas.[33/] The Commission decided to implement EAEAs "by July 1, 1984 unless evidence was received by the Commission demonstrating that it would not be economically beneficial to the ratepayers."[34/] Following hearings held in June of 1984, the Commission issued Orders Nos. 13750 and 13912 establishing and implementing EAEAs and interim toll monopoly areas.

In its initial order of December 9, 1983, the Commission broadly defined the goals of the proceeding as follows:

> The primary goal in the proceeding was to set access charges that would adequately compensate the LECs for the use of their local facilities for originating and terminating toll traffic and to provide incentives for competition, while maintaining universal telephone service.[35/]

In addition, in Commission Order No. 13750, the Commission noted that "[c]onsistent with these broad policy goals, the Commission sought to implement equal access, a goal under the MFJ" and that the "vehicle chosen by the Commission to implement equal access

---

33/ Id.

34/ A.3.

35/ A.5 (emphasis added); see id. at 6, 16, 27.

in Florida was the Equal Access Exchange Area."[36/] As the Commission explained in Order No. 13750, the EAEAs define "geographic areas, configured based on 1987 planned toll center/access tandem areas, in which LECs are responsible for providing equal access to both carriers and customers of carriers in the most economically efficient manner."[37/]

In Order No. 13750, the Commission also ordered that "there shall be toll transmission monopoly areas in which the LECs shall be the sole supplier of transmission facilities."[38/] These TMAs were geographically equivalent to the EAEAs. Accordingly, the Commission prohibited interexchange carriers from competing with LECs in carrying interexchange calls between points within an EAEA over the interexchange carriers' own network facilities. Instead, the Commission's orders required interexchange carriers to route all intra-EAEA interexchange calls through facilities and services purchased solely from the

---

36/ A.2-3.

37/ A.5. The Commission defined "equal access" as follows:

> 'Equal access' is technically equal access with respect to the number of digits dialed, access for customers with rotary dial or push button telephones, automatic number identification, the availability of billing information, the availability of presubscription and equal transmission quality.

A.3.

38/ A.10.

LECs and to block and screen such calls from their own facilities to ensure that intra-EAEA calls routed over LEC toll networks.[39/]

2. Microtel II: This Court Upheld the Commission's Creation of EAEAs As A Transition to Full Toll Competition

The Commission's decision to establish EAEAs and toll monopoly areas was appealed to this Court by GTE Sprint, one of US Sprint's predecessors, and several other long distance carriers. The gravamen of the appeal was the contention that under Florida Statutes section 364.335(4) the Commission lacked authority to grant toll monopolies on long distance service.[40/] While this Court reiterated its prior conclusion from Microtel I that "the legislature has made the fundamental and primary decision that there will be competition in intrastate long distance telephone service,"[41/] the Court concluded that the statute could not be read "so expansively as to require instant, unlimited competition in all long distance services."[42/] In reaching this conclusion and affirming the Commission's actions, the Court relied upon the interim nature of the Commission's plan

---

39/ A.10, A.11, A.16.

40/ Microtel II, 483 So. 2d at 418.

41/ Id. (emphasis added), citing Microtel I,, 464 So. 2d at 1191.

42/ Microtel II, 483 So. 2d at 418 (emphasis added).

in terms both of limited geographic scope and duration. The Court emphasized that "[t]he PSC plan contemplates reexamination of the toll monopoly concept in September 1986 when the beneficiaries of the monopoly will have to justify its retention. Thus, the monopoly concept is limited in time."[43/]

This Court's understanding that toll monopoly areas would be in place for only a short period was clearly seminal to its decision to affirm the Commission's interim plan. Specifically, the court stated:

> We do not read the orders under review as contemplating, nor do we understand it to be PSC's position, that toll monopolies will continue beyond an interim period during which the transition is made to monopoly in local services only. . . .
>
> [W]e do not believe that it is PSC's position that it has authority to maintain permanent toll monopolies. If that position changes and is challenged after September 1986, we will examine the issue on its merits. It is premature to do so now.[44/]

The Court therefore approved the Commission's decision upon the understanding that the order's establishment of TMAs represented an "interim plan" for a transition to the full toll competition mandated by the legislature.

43/ Id. (emphasis added).

44/ Id. at 419 (emphasis added).

E. Commission Order No. 16343: Further Proceedings Prior to the Scheduled Expiration of TMAs Result in Their Retention On a Permanent Basis

Consistent with its commitment to do so, the Commission held hearings on May 1 and 2, 1986 to revisit the issue of interim toll transmission monopoly areas. Testimony was submitted by a number of witnesses appearing on behalf of long distance and local exchange telephone companies. Following the hearings, the parties to the proceeding submitted briefs on the issues previously identified by the Commission, with the Commission Staff later preparing and submitting its recommendation to the Commission.

The issues raised during the proceeding were the subject of extensive public record discussion among the Commissioners during a Special Agenda Conference held June 24, 1986. At the Special Agenda Conference, the Commission determined to adopt the Staff recommendation to continue toll transmission monopolies for intra-EAEA toll service. The transcript of tne conference indicates general concurrence among the Commissioners that the prohibition upon facilities-based intra-EAEA toll competition would not be limited in time or subject to automatic review by the Commission absent evidence of changed circumstances.[45/] Thus, the prohibition adopted by the Commission was clearly permanent rather than transitional in

---

45/ A.40-42 and 45-46.

nature. Nonetheless, some Commissioners were reticent to use the word "permanent" in describing the prohibition. Chairman Marks therefore directed that the record reflect "that the word permanent was not used."[46/]

The Commission's decision at the Special Agenda Conference was embodied in Order No. 16343, issued July 14, 1986. In its decision, the Commission articulated three primary bases for continuing to prohibit long distance companies from using their own facilities to complete intra-EAEA toll calls.

First, the Commission concluded that if facilities-based intra-EAEA toll competition were permitted, "the overwhelming majority of telephone consumers. . . would pay higher local rates but would not have sufficient toll call volumes to take advantage of the lower toll rates" that would be available from competing carriers.[47/] The Commission based that conclusion upon its belief that local exchange companies would suffer a loss in revenues if facilities-based long distance companies were allowed to offer intra-EAEA toll service. Second, the Commission concluded that "the elimination of TMAs will likely require the implementation of company-specific and route-specific LEC toll rates."[48/] Third, the Commission held that

---

46/ A.46.

47/ A.30.

48/ A.28.

permitting facilities-based intra-EAEA toll competition would diminish the economies of scale realized by the LECs' intra-EAEA transmission networks.[49/] The Commission stated that "it continues to be desirable to allow only the LECs to provide intra-EAEA transmission facilities. This would allow intra-EAEA service to be provided in a manner that would be less costly to the majority of the consumers of telephone service in Florida."[50/]

In its conclusion, the Commission noted that "[i]n Order No. 13750, issued October 5, 1984, we viewed TMAs as an interim measure, to be reviewed prior to September 1, 1986."[51/] In this order, unlike Order No. 13750, the Commission did not depict intra-EAEA toll transmission monopolies as an interim or transitional measure. Rather, the Commission determined that "[a]s the industry exists today, it is not in the public interest to abolish TMAs."[52/]

Consistent with its rejection of facilities-based intra-EAEA toll competition, the Commission now has reversed its earlier presumption against the retention of toll monopoly areas. In Order No. 13750, the Commission implemented intra-EAEA toll transmission monopolies on an interim basis and placed the burden

---

49/ A.30-31.

50/ A.30.

51/ A.36.

52/ Id.

of proof in further proceedings upon those parties advocating continuance of the monopolies. In the order that is the subject of this appeal, the Commission essentially shifted that burden, noting that "[n]othing in this decision precludes any interested party from coming forward with a showing of significantly changed circumstances which would warrant the abolition of TMAs."[53/] The record leaves little doubt that the Commission has established toll monopoly areas on a permanent basis.

53/ Id.

Summary Of Argument

In this appeal, US Sprint contests the Commission's determination to continue its prohibition upon facilities-based intra-EAEA toll competition. US Sprint rests its challenge upon two grounds.

First, the Commission's determination to order intra-EAEA toll monopolies on a permanent basis frustrates the legislative policy in favor of toll competition and departs from the legislative mandate to the Commission to implement a competitive market structure. In those respects, the Commission's decision in the proceeding below differs from the earlier case, previously presented to this Court, in which the Commission's establishment of intra-EAEA toll monopolies was depicted by the Commission as a transitional measure of limited duration designed to implement the legislatively-prescribed policy of toll competition. The Commission's conclusions in support of its decision evidence the inconsistency of the Commission's present actions with the policy established by the legislature to promote toll competition. The Commission's conclusions reveal the application of a "first-in-the-field" analysis expressly rejected by the legislature in amending Chapter 364. The Commission thus has acted contrary to and in clear excess of its authorizing statutes, specifically Florida Statute section 364.335(4) as construed by this Court on two earlier occasions.[54/]

54/ See Microtel II, 483 So. 2d at 419-20; Microtel I, 464 So. 2d at 1191.

As a second basis for its appeal, US Sprint submits that the Commission's action is not supported by competent substantial evidence of record and is therefore arbitrary and capricious. The Commission's error in concluding that most telephone subscribers would not experience sufficient toll savings from facilities-based intra-EAEA toll competition to offset the potential increase in local rates is apparent on the face of the order, because the Commission specifically found the record insufficient to quantify potential rate increases. There is similarly no competent evidence that the toll monopoly areas must be maintained to prevent route-by-route toll rate deaveraging; on the contrary, the only testimony based upon actual experience in the market demonstrated that established carriers have not deaveraged their toll rates when competitors entered the market. Finally, there is no evidence that authorization of facilities-based intra-EAEA toll competition would disrupt natural economies of scale or create market inefficiencies to the detriment of the public.

The Commission's unlawful establishment of permanent toll monopolies in Order No. 16343 must, accordingly, be reversed and facilities-based toll competition permitted without further delay for all interexchange service routes in Florida.

Argument

I. THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY IN CONTINUING TOLL MONOPOLY AREAS.

The Commission's determination to establish toll transmission monopolies in intra-EAEA toll service must be overturned because it exceeds the powers granted to the Commission by the legislature. The grant of legislative authority must be examined as a threshold matter because the Commission, as an administrative agency, "derives its power solely from the legislature."[55/] Where reasonable doubt exists whether a particular power is vested in an administrative body, the power is deemed to have been denied.[56/] That delimitation is consistent with the principle

---

55/ United Tel. Co. v. Public Service Comm'n, 11 Fla.L.W. 330, 331 (Fla. July 18, 1986). See also Florida Bridge Co. v. Bevis, 363 So. 2d 799 (Fla. 1978); Florida Department of Law Enforcement v. Hinson, 429 So. 2d 723 (Fla. 1st DCA 1983); Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787 (Fla. 1st DCA 1982), review denied, 436 So. 2d 98 (Fla. 1983); Department of Citrus v. Office of Comptroller, 416 So. 2d 820 (Fla. 2d DCA 1982); Fiat Motors of North America v. Calvin, 356 So. 2d 908 (Fla. 1st DCA), cert. denied, 360 So. 2d 1247 (Fla. 1978).

56/ As set forth by this Court in Florida Bridge Co.,

> [The] Commission's powers duties and authority are those and only those that are conferred expressly or impliedly by statute of the state. Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested. 363 So. 2d at 802 (quoting Cape Coral v. GAC Utilities, 281 So. 2d 493 (Fla.

(Footnote Continued)

that "government should not intrude to restrict or limit freedom of private enterprise to function in any area unless governing statutes clearly so provide."[57/]

Chapter 364 of the Florida Statutes, which governs the regulation of telephone companies, does not grant the Commission the power to protect established telephone companies from duplication of their toll services and facilities. Rather, the legislature, in amending those statutes in 1982, clearly intended to establish a policy of toll competition for the Florida telephone industry.

Prior to 1982, the statute that historically governed certification of telephone companies in Florida gave the telephone service monopoly company that was "first-in-the-field." That policy was set forth in the statute as follows:

> The commission shall not grant a certificate for a proposed plant, line, or system, or extension thereof, which will be in competition with or duplication of any other plant, line, or system, unless it shall first determine that the existing facilities are inadequate to meet the reasonable needs of the public, or that the person operating the same is unable to or refuses or neglects to provide reasonably adequate service.[58/]

(Footnote Continued)

1973)).

Florida Bridge Co., 363 So. 2d at 802.

57/ Greyhound Lines, Inc. v. Greyhound Lines-East Division, 275 So. 2d 1, 3 (Fla. 1973).

58/ Fla. Stat. § 364.35 (1979). The statute was revised in 1980 as a result of the sunset review process with the legisla-

(Footnote Continued)

The first-in-the-field principle has been articulated generally as a policy "to avoid duplication of common carrier services and to afford the existing common carriers capable of providing the service the opportunity to do so."[59/] The rationale for the first-in-the-field approach was the premise that "duplication and cutthroat competition among [communications, transportation and public utility] industries will inevitably result in depriving the public of reliable services, such as telephone, electric, freight carrying, or transportation of passengers."[60/]

As discussed in the "Statement of the Case and Facts," supra, in 1982 the legislature revoked the longstanding first-in-the-field policy with respect to toll telephone service. The current statute by its plain language removes entirely the prohibition upon the duplication of facilities and restricts the monopoly rights of an established telephone company to "local exchange services." The amended statute reads in pertinent part as follows:

(Footnote Continued)

ture modernizing the language but leaving this basic doctrine unchanged. See Ch. 80-36, § 27, 1980 Fla. Laws 114, 128 (codified at Fla. Stat. § 364.335(4) (Supp. 1980)).

59/ Commercial Carrier Corp. v. Mason, 177 So. 2d 337, 339 (Fla. 1965).

60/ Carbo, Inc. v. Meiklejohn, 217 So. 2d 159, 160 (Fla. 1st DCA 1968), cert. denied, 225 So. 2d 533 (Fla. 1969).

> The commission shall not grant a certificate for a proposed telephone company, or for the extension of an existing telephone company, which will be in competition with or duplicate the local exchange services provided by any other telephone company unless it first determines that the existing facilities are inadquate to meet the reasonable needs of the public and it first amends the certificate of such other telephone company to remove the bases for competition or duplication of services.61/

The legislature's limitation of the first-in-the-field doctrine to "local exchange services" employs the traditional distinction between local and long distance telephone service.62/ That distinction is expressly recognized in the Commission's regulations.

In its regulations, the Commission defines "Exchange (Service) Area" as "[t]he territory, including the base rate suburban and rural areas served by an exchange, within which local telephone service is furnished at the exchange rates applicable within that area."63/ In contrast, a "Toll Message" is defined

---

61/ Fla. Stat. § 364.335(4) (1985) (emphasis added).

62/ As the Nebraska Supreme Court has observed:

> Traditionally in the telephone industry there have been two well-defined branches of the business, one the long distance system and the other the local exchanges.

Northwestern Bell Telephone Company v. Consolidated Telephone Company of Dunning, 142 N.W.2d 324, 326 (Neb. 1966).

63/ Florida Admin. Code Rule 25-4.03(11).

as "[a] completed telephone call between stations in different exchanges for which message toll charge [sic] are applicable."[64/] Those definitions comport with the conventional meanings of the terms "local exchange service" and "toll service."[65/]

On its first occasion to construe the 1982 amendment, this Court determined that the object of the legislature was to bring competition into intrastate toll telephone services. Specifically, the Court held that "the legislature made the 'fundamental and primary policy decision' that there be competition in long distance telephone service."[66/] In focusing upon the "clear legislative intent to foster competition," this Court explained that the legislative standards and guidelines for certification to provide long distance service are narrowly focused upon the need for the Commission to obtain information regarding the qualifications, facilities, and substitute services of an applicant.[67/]

In Microtel II, this Court reiterated its earlier conclusion that "the legislature has made the fundamental and primary decision that there will be competition in intrastate long distance telephone service."[68/] In that decision, this Court

---

64/ Florida Admin. Code Rule 25-4.03(46).

65/ Compare 47 U.S.C. § 153(r) and (s) (1962).

66/ Microtel I, 464 So. 2d at 1191.

67/ Id.

68/ Microtel II, 483 So. 2d at 418.

approved the Commission's "interim plan" establishing intra-EAEA toll transition monopolies for approximately a two-year period. The temporary nature of the toll monopolies was a critical element in the Court's determination that the Commission had not exceeded its authority:

> As we indicated above in our discussion of the interim period of these toll monopolies, we do not believe that it is PSC's position that it has authority to maintain permanent toll monopolies. If that position changes and is challenged after September 1, 1986, we will examine the issue on its merits.69/

Similarly, in addressing the argument that permitting toll monopolies would amount to an unconstitutional delegation of legislative power, the Court relied upon the brief duration of the toll monopoly areas in holding that there was neither a deficiency in the statute nor an unauthorized action by the Commission. The Court explained that "we do not read the order under review as contemplating, nor do we understand it to be PSC's position, that toll monopolies will continue beyond an interim period during which the transition is made from total monopoly on all services to monopoly in local services only."70/

Clearly, the decision of the Commission which is the subject of this appeal has no such saving quality, for it cannot fairly be characterized as an "interim" or transitional measure.

69/ Id. at 419 (emphasis added).

70/ Id. (emphasis added).

This decision of the Commission amounts, instead, to a permanent prohibition upon facilities-based toll competition within the equal access exchange areas. As such, the Commission's decision resists and frustrates the accomplishment of the legislative mandate for toll competition.

Lest there be any doubt regarding the legislature's pro-competitive policy for the telecommunications industry, more recent amendments to section 364.335 provide further guidance in discerning the governing legislative intent. In 1982, the legislature authorized competition in toll service but reserved local exchange services to be provided on a monopoly basis. Since 1982, the legislature has moved even further in the direction of full competition in the telephone industry by authorizing competitive provision of certain types of local exchange services (i.e., pay telephone service and cellular radio service).[71/] Obviously, the legislature is pursuing a policy of swift and steady progress toward a competitive telecommunications environment in Florida.

The Commission's attempt to turn back the clock on toll competition, contrary to legislative intent, is manifest from the reasons articulated by the Commission in support of its decision. The Commission's findings are all components of the first-in-the-field principle rather than the pro-competitive policy established by the legislature.

71/ Fla. Stat. § 364.335(4) and (6) (1985), respectively.

In its order, the Commission articulated three primary bases for its determination to continue facilities-based monopolies in intra-EAEA toll service. The Commission concluded that intra-EAEA facilities-based competition would cause local rate increases that would not be offset by reductions in toll charges, could create pressure for selective route rate deaveraging, and would eliminate the local exchange carrier economies of scale through duplication of facilities.[72/] Those considerations are not, however, relevant to a market where, as the Commission proclaims, "there is currently a large amount of competition."[73/] Rather, the Commission's analysis exhibits the concerns typically associated with a natural monopoly industry.[74/]

Similarly, the conclusions and concerns articulated in the Commission's order are premised upon inapplicable statutory authority. Throughout its order, the Commission cites the various sub-parts of Florida Statutes section 364.337(2) in an attempt to support its conclusion that facilities-based intra-EAEA toll competition should not be permitted. But the Commission clearly erred in applying that statutory provision to its

---

72/ See discussion at A.27-31.

73/ A.31.

74/ Carbo, Inc. v. Meiklejohn, 217 So. 2d at 160; Northwestern Bell Telephone Company v. Consolidated Telephone Company of Dunning, 142 N.W.2d 324 (Neb. 1926).

deliberations. As this Court carefully explained in Microtel I, "the enumerated criteria of section 364.337(2) are to be considered in determining what special requirements and exemptions from regulation should govern the certified company. They are not relevant to the initial determination of whether to issue the certificate."[75/]

This Court emphasized that the public interest standard for certification under section 364.335(4) is to be determined with reference to the requirements section 364.335(1). Thus, the standards for certification focus upon the qualifications and fitness of each individual applicant. The Court rejected an argument that the public interest standard of section 364.335(4) could be used to deny competitive entry generally on the basis of the concerns enumerated in section 364.337(2), stressing that "[t]he clear legislative intent to foster competition also illuminates the public interest standard of section 364.335(4)."[76/]

While the conclusions underlying the Commission's decision comport with the traditional description of utility monopolies, the Commission is not free to establish or to maintain a monopoly in toll service, as it has done here. The nature of the amendments to the statutory scheme leave no doubt that the legislature intended to abolish toll monopolies. If the

---

75/ Microtel I, 464 So. 2d at 1191.

76/ Id.

legislature had desired to afford the Commission the option of continuing toll monopolies, it would have said so and provided adequate standards and guidelines to be applied in the Commission's determinations. In that respect, the statutory provisions applicable to the grant of authority under section 364.335 for competitive toll carriers stand in stark contrast to more recent legislation which contains such directives in the context of local service entry.

In 1986, the legislature enacted Committee Substitute for House Bill 718, adding to the Commission's authorizing statutes a new section, section 364.339. That section expressly gives the Commission the option of authorizing competitive provision of shared tenant service which duplicates or competes with local service provided by an existing local exchange telephone company. Further, the statute enumerates the criteria to be applied by the Commission in determining whether to authorize such competitive entry:

> (a) The number of firms providing the services;
>
> (b) The availability of the service from other firms on a local exchange telephone company;
>
> (c) The quality of service available from alternative suppliers;
>
> (d) The effect on telephone service rates charged to customers of the local telephone company;
>
> (e) The geographic extent of the service to be provided; and
>
> (f) Any other factors which the Commission deems relevant.77/

77/ Ch. 86-270, § 1, 1986 Fla. Sess. Law Serv. 314, 315 (West), to be codified at Fla. Stat. § 364.339(3). Note that while

(Footnote Continued)

Quite clearly, when the legislature wishes to afford the Commission the option of approving or denying competitive entry, the legislature is perfectly capable of articulating that purpose and of providing the necessary standards and guidelines to avoid an unconstitutional delegation of legislative power.

In section 364.335, the legislature provided standards for assessing the fitness of an individual applicant but not for determining the wisdom of a competitive toll market structure. Had the legislature intended to afford the Commission the option of rejecting toll competition, it would have been bound to prescribe the standards to be applied in the Commission's determination. The legislature's failure to do so, while at the same time prescribing detailed standards for the application of streamlined regulation,[78/] clearly demonstrates that the Commission was not given the option of rejecting toll competition.

Finally, the Commission cannot claim that it is following the legislative mandate to promote toll competition by allowing "competitors" to provide intra-EAEA toll service via resale of local exchange carrier facilities and services.[79/]

(Footnote Continued)

these criteria are very similar to the language appearing at section 364.337(2), the purposes for each are quite different.

78/ Fla. Stat. § 364.337 (1985).

79/ See A.31. From a practical standpoint, effective competition between a facilities-based monopoly telephone company

(Footnote Continued)

Allowing resale but not facilities-based competition preserves the prohibition upon duplication of facilities that is a component of the natural monopoly or first-in-the-field doctrine clearly rejected by the legislature. The legislative intent to implement facilities-based toll service is apparent by the limitation of the prior prohibition upon any duplication of facilities. The only reference to "facilities" contained in the current statute is the prohibition upon competing local exchange services unless the Commission "determines that the existing facilities are inadequate to meet the reasonable needs of the public."[80/] Manifestly, on the face of the statute, the legislature limited any restriction upon duplication of facilities to local exchange facilities. Indeed, interexchange carriers certificated for facilities-based toll service have no need to obtain Commission approval for construction of additional facilities within the state.[81/] Thus, the Commission has exceeded entirely its statutory authority in attempting to restrict duplication of facilities by forbidding long distance carriers to provide intra-EAEA toll service over their own facilities. Moreover, it is

---

(Footnote Continued)

> and a reseller is virtually impossible, because the facilities-based company exerts absolute control over the price of the services to be resold.

80/ Fla. Stat. § 364.335(4) (1985).

81/ See Fla. Stat. § 364.33 (1985).

clear that resale of the services of established monopoly telephone companies is not the toll competition intended by the legislature.

In sum, the Commission's decision stands directly contrary to the determination of the legislature that telephone monopolies should be limited to local exchange service and that competition in the provision of toll service should be fully implemented. Rather than "implementing the federal and state law that there be competitive long distance service,"[82/] the Commission has acted to frustrate the operation of the statutory scheme set forth by the legislature. Moreover, had the legislature intended to allow the Commission to prohibit toll competition, the statutory scheme would fail as an unconstitutional delegation of legislative power. As this Court recently found in the United decision, where the Commission acts without statutory authority, the ultra vires decision of the Commission must be reversed.[83/] Accordingly, the Commission should be ordered immediately implement competitive facilities based intra-EAEA toll service in Florida.

82/ Microtel II, 483 So. 2d at 418.

83/ United Tel. Co. v. Florida Public Service Commission, 11 Fla. L.W. 330 (Fla. July 18, 1986).

II. THE COMMISSION'S DECISION TO CONTINUE TOLL TRANSMISSION MONOPOLIES IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE ON THE RECORD

When it initially established toll monopoly areas as an interim measure in 1984, the Commission ruled that parties advocating retention of toll transmission monopolies beyond September 1, 1986 would be required to "demonstrate why continuation of such areas is in the public interest."[84/] This Court relied upon that representation in finding that the Commission's interim plan for the transition to full toll competition was reasonable.[85/] That approach is consistent with the general principle of Florida administrative law imposing the burden of proof upon those advocating the affirmative of an issue.[86/] However, as the record below demonstrates, the burden has not been met and there is no competent substantial evidence in that record to support the Commission's decision to continue the monopolies beyond September 1, 1986.

The statute governing appellate review of Commission decisions, Florida Statute section 120.68(10) (1985), requires "competent substantial evidence in the record" to support any findings of fact made by the Commission.[87/] This Court has

---

84/ A.13.

85/ Microtel II, 483 So. 2d at 418.

86/ Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

87/ Florida Power Corp. v. Public Service Comm'n, 456 So. 2d 451, 452 (Fla. 1984); Gulf Power Co. v. Florida Public

(Footnote Continued)

described "competent substantial evidence" as "'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or] . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'"[88/] Without the requisite competent substantial evidence of record, a reviewing court may either reverse or remand the Commission's action.[89/]

Although there is a presumption of validity regarding the Commission's decisions, that presumption can be overcome "when either the invalidity of the Commission's decision appears plainly on the face of the order, rule, regulation or schedule, or where such weakness is made to appear by clear and satisfactory evidence."[90/] Moreover, if an essential finding is based

---

(Footnote Continued)

Service Comm'n, 453 So. 2d 799, 803 (Fla. 1984); Southern Bell Tel. & Tel. Co. v. Florida Public Service Comm'n, 443 So. 2d 92, 95 (Fla. 1983).

88/ Duval Utility Co. v. Florida Public Service Comm'n, 380 So. 2d 1028, 1031 (Fla. 1980) (quoting De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (bracketing in Duval Utility Co.).

89/ Fla. Stat. § 120.68(10) (1985); MCI Telecommunications Corp. v. Florida Public Service Comm'n, 491 So. 2d 539 (Fla. 1986).

90/ Florida Rate Conference v. Florida Railroad and Public Utilities Comm'n, 108 So. 2d 601, 605 (Fla. 1959). See also, United Tel. Co. v. Florida Public Service Comm'n, 11 Fla. L.W. 330 (Fla. July 18, 1986).

solely on unreliable evidence or upon no evidence at all, the order should be held insufficient.[91/]

In the proceedings before the Commission, the local exchange telephone companies were the proponents of maintaining EAEAs as toll transmission monopoly areas. Those companies, therefore, bore the burden of proof to establish that facilities-based toll transmission monopolies should be maintained within the EAEAs. This was expressly emphasized by the Commission and by the Court in the earlier consideration of the EAEA issue.[92/] It is well settled in Florida law that the party with the burden of proof can meet that burden only by a preponderance of evidence.[93/] This means that the burden "is not satisfied by proof creating an equipoise."[94/] The local exchange carriers did not meet their burden of proof, nor is there competent and substantial evidence to support the Commission's decision to maintain toll transmission monopolies.

One of the three primary conclusions reached by the Commission[95/] was that facilities-based toll competition within

---

91/ Blocker's Transfer & Storage Company v. Yarborough, 277 So. 2d 9, 12 (Fla. 1973).

92/ See Microtel II at 418.

93/ Visingardi v. Tirone, 193 So. 2d 601 (Fla. 1966).

94/ Florida Dep't of Health & Rehab. Servs. v. Career Service Com. of Dept. of Administration, 289 So. 2d 412, 415 (Fla. 1974) (quoting 2 Am. Jur. 2d Administrative Law § 392).

95/ See the description of the Commission's primary conclusions, supra at 20.

EAEAs would cause local rate increases that would not be offset by reduced toll charges. That conclusion is not supported by competent and substantial evidence on the record. The Commission specifically rejected the only evidence available to establish the potential impact on local rates, holding that the record was insufficient "to reasonably calculate the maximum net revenue impact of the introduction of the intra-EAEA transmission competition" or to determine the potential increase in local rates.[96/]

Having thus refused to accept the only documentary evidence establishing potential impact on local rates, the Commission acted arbitrarily and without competent substantial evidence in basing its decision upon a conclusion that "the overwhelming majority of telephone consumers . . . would pay higher local rates but would not have sufficient toll call volumes to take advantage of the lower toll rates."[97/] If, as the Commission stated, the local exchange companies did not provide sufficient information to calculate the net revenue impact and potential local rate changes associated with the introduction of facilities-based intra-EAEA competition, it follows ineluctably that there can be no competent or reliable basis for the Commission's conclusion that the increase in local rates would not be offset by lower toll rates for most customers. The

---

96/ A.32-33.

97/ A.30.

Commission cannot base its finding upon evidence that it deems unreliable.[98] Because the Commission judged the record insufficient to support any reasonable determination of potential impact upon LEC revenues or local telephone rates, the Commission's error as to its conclusions on those points is apparent upon the face of the order.[99]

The record similarly lacks credible support for the Commission's conclusion that route-by-route rate deaveraging would result from facilities-based intra-EAEA toll competition. On the contrary, the record demonstrates that AT&T, which previously held a monopoly in the interstate toll market, has maintained geographically averaged rates during the introduction and development of interstate toll competition.[100] Further, AT&T's competitors have been moving toward a greater rather than lesser degree of geographic rate averaging.[101] In fact, the testimony indicated that all of the major long distance carriers currently employ averaged rate structures within each jurisdiction.[102]

98/ Florida Rate Conference v. Florida Railroad and Public Utilities Commission, 108 So. 2d at 608. See also MCI Telecommunications Corp. v. Florida Public Service Comm'n, 491 So. 2d at 541, where this Court reversed the Commission, observing that even the Commission "recognized that 'the data presented in this proceeding was imperfect.'"

99/ Id.

100/ Cornell, Tr. at 563.

101/ Cornell, Tr. at 578.

102/ Cornell, Tr. at 577-78.

The Commission's conclusion that facilities-based intra-EAEA competition will produce route-by-route rate deaveraging is not based upon competent evidence and is therefore entirely arbitrary.

Finally, the Commission held that the LECs' toll transmission monopolies should be maintained to ensure their networks' economies of scale and to avoid inefficient duplication of LEC facilities.[103/] The Commission's approach to the existence of economies of scale essentially puts the cart before the horse. The Supreme Court of the United States has observed in another context that "public utility companies are natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale. [citation omitted] Regulation was superimposed on such natural monopolies as a substitute for competition and not to eliminate it."[104/]

As the Supreme Court indicated, utility regulation developed as an attempt to discipline the market behavior of a natural monopoly that would otherwise be impervious to competitive forces. The Commission's decision distorts the traditional approach by denying competitive entry in an attempt to create economies of scale that do not exist naturally in the market.

103/ A.30.

104/ Jackson v. Metropolitan Edison Company, 419 U.S. 345, 351, 42 L.Ed.2d 477, 95 Sup. Ct. 449, 454 (1974), n.8.

Moreover, the Commission's conclusions regarding the economic efficiency of preserving the LECs' toll monopolies are unsupported by the evidence in the proceeding below.

The Commission's conclusion that intra-EAEA facilities-based competition would be economically inefficient is contradicted by two essential facts established upon the record. First, the long distance telephone companies operating in Florida already have their own facilities in place throughout the state that could be used to carry intra-EAEA traffic.[105/] Second, a long distance company is likely to carry intra-EAEA traffic over a network that combines the company's own facilities with facilities leased from local exchange companies and other carriers.[106/] The one engineering expert who testified in the proceeding explained that carriers will not build duplicate facilities absent sufficient economic justification.[107/] Moreover, another witness who speculated that economically irrational duplication would be likely to occur could not cite a single instance of such behavior in the real world of toll competition.[108/]

There is no competent record evidence to support a conclusion that facilities-based intra-EAEA toll service is a

---

105/ Strich, Tr. at 373.

106/ Strich, Tr. at 379, 397 and 407.

107/ Strich, Tr. at 373 and 378.

108/ Johnson, Tr. at 673.

natural monopoly. On the contrary, the evidence demonstrates that the existing ban on such competition introduces artificial inefficiencies into the networks of long distance companies.[109/] The record is similarly devoid of support for the Commission's determination that facilities-based intra-EAEA toll competition would produce route-by-route rate deaveraging. As discussed, all competent evidence, based upon experience with toll competition over the past fifteen years, establishes that such deaveraging will not occur. Finally, there is no competent evidence to support the Commission's determination that any potential increase in local rates due to the introduction of facilities-based intra-EAEA toll competition, assuming that one would occur, would not be offset by savings on toll rates.

The parties advocating continuation of the prohibition upon facilities-based intra-EAEA toll service clearly failed to carry their burden of proof. The evidence of record does not rise to the level of equipoise, let alone the preponderance needed to retain toll monopoly areas beyond September 1, 1986. Moreover, the Commission's decision to establish a permanent prohibition on such competition is arbitrary because it is unsupported by competent and substantial record evidence. The order should be reversed.

109/ Cornell, Tr. at 545-46 and 586-87; Strich, Tr. at 383.

Conclusion

For the foregoing reasons, this Court should reverse the Florida Public Service Commission's decision in the proceeding below and order the Commission to permit qualified facilities-based long distance carriers to engage immediately in the offering and provision of intra-EAEA toll service.

Respectfully submitted,

US SPRINT COMMUNICATIONS COMPANY

Stephen P. Bowen
1850 M Street, N.W.
Suite 1110
Washington, D.C. 20036
(202) 857-1030

Deborah A. Dupont
REBOUL, MACMURRAY, HEWITT, MAYNARD & KRISTOL
1111 19th Street, N.W.
Suite 406
Washington, D.C. 20036
(202) 429-0004

Bruce W. Renard
MESSER, VICKERS, CAPARELLO, FRENCH & MADSEN
P.O. Box 1876
Tallahassee, FL 32302
(904) 222-0720

October 22, 1986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Appellant U.S. Sprint Communications Company has been sent by U.S. Mail this 22nd day of October, 1986 to the following parties of record:

Steve Tribble, Director
Division of Records and
Reporting
Florida Public Service
Commission
101 East Gaines Street
Tallahassee, FL 32301

Jerry M. Johns, Esq.
Alan N. Berg, Esq.
United Telephone Company
of Florida
Post Office Box 5000
Altamonte Springs, FL 32715-5000

William Bilenky, Esq.
Susan Clark, Esq.
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

John P. Fons, Esq.
Aurell, Fons, Radey & Hinkle
Post Office Box 10154
Tallahassee, FL 32302

Robert J. McKee, Jr., Esq.
Post Office Box 7800
Atlanta, GA 30357

Richard D. Melson, Esq.
Hopping, Boyd, Green & Sams
Post Office Box 6526
Tallahassee, FL 32314

Lawrence E. Gills, Esq.
Southern Bell Telephone &
Telegraph Company
Attn: Frank Meiners
311 S. Calhoun Street
Suite 204
Tallahassee, FL 32301

Jack Shreve, Esq.
Charles J. Beck, Esq.
Office of Public Counsel
624 Bronough Street
Crown Building
Tallahassee, FL 32301

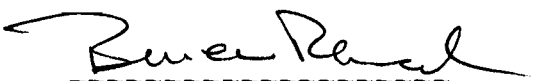
Patrick K. Wiggins, Esq.
Kathleen Villacorta, Esq.
Ranson & Wiggins
Post Office Drawer 1657
Tallahassee, FL 32302

William H. Adams, III, Esq.
Mahoney, Adams, Milam, et al.
Post Office Box 4099
Jacksonville, FL 32201

Robert J. Winicki, Esq.
5451 Robert Scott Drive, N.
Jacksonville, FL 32207

Thomas R. Parker, Esq.
Leslie R. Stein, Esq.
Lorin H. Albeck, Esq.
James V. Carideo, Esq.
General Telephone Company
Post Office Box 110, MC 7
Tampa, FL 33601

Ed Nissen, Esq.
Microtel, Inc.
7100 West Camino Rell
Suite 311
Boca Raton, FL 33433



Bruce W. Renard